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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT, ANDREW J. WATT, IN OPPOSITION.

FRED H. BARTLIT, JR.,
THOMAS A. GOTTSCHALK,
JEFFREY S. DAVIDSON,
KIRKLAND & ELLIS,
Suite 6000,
200 East Randolph Drive,
Chicago, Illinois 60601,
(312) 861-2000,
Attorneys for Appellant,
Andrew J. Watt.

Of Counsel:
KIRKLAND & ELLIS,
200 East Randolph Drive,
Chicago, Illinois 60601,
(312) 861-2000.

Dated: June 8, 1977.

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Certiorari is unwarranted in this case. The Court of Appeals' decision rests on the unique facts of this prosecution and several independent substantive errors of the trial court which precluded the respondents from receiving a fair trial. Petitioner identifies at least four separate grounds of decision. Importantly, no conflict between the circuits is claimed for any of them; nor is any special significance asserted as to three of the issues presented which would warrant their review standing alone. In fact, there are still more grounds presented to the appellate court in supporting its judgment which would require review before the judgment could be altered.

The supposed significance of the "antitrust issue" is exaggerated. The circuits are uniformly and correctly aligned against

the petitioner's position; this Court has twice previously refused to review that issue. Moreover, the position which petitioner now advances is a significant departure from the theory on which the prosecution was instituted and tried. Far from reconciling two antitrust statutes, which the circuits have already accomplished, the result sought by petitioner would require transformation of a rule of reason issue into a *per se* offense and its impermissible retroactive application in the context of a criminal prosecution.

SUPPLEMENTAL STATEMENT.

Certain key aspects of the proceedings below are omitted from the petition's statement or are stated incorrectly. Before the many reasons which mitigate against granting the petition are discussed, supplementation of the petitioner's statement is essential.

1. *Theory of the Prosecution.* The indictment charged respondents and others with a sprawling, 13-year conspiracy to fix prices, credit terms, and packaging methods for gypsum wallboard.[1] The prosecution's theory at trial was that respondents had engaged in "garden variety" price fixing and had even met with each other to raise and fix prices. Respondents vigorously denied the charge of price fixing and disputed that they had ever agreed on the prices or credit terms for gypsum wallboard.

The exchange of pricing information, which primarily occurred before the period covered by the statute of limitations and on which the petition focuses, was alleged to be merely one of thirteen claimed means and methods *purposely* used to effectuate the alleged price fixing conspiracy. (App. 45a-46a) As the Court of Appeals observed, the trial record offered

1. See the Joint Appendix filed with the Court of Appeals (hereinafter cited as "App.") at p. 44a. Portions of the trial transcript not included in the Joint Appendix are hereinafter cited as "Tr.".

support for respondents' position that occasional verification of dubious customer reports of lower competitive prices (which the prosecution termed price exchanges) was done pursuant to legal advice in order to satisfy the "good faith" element of the Robinson-Patman Act's "meeting competition" defense when competing on the basis of discounts from list prices.[2] At trial, respondents' lawful purpose for verification was challenged by the prosecution as a "sham" and an after-the-fact disguise for allegedly purposeful price fixing. (Tr. 14,698; Tr.13,850)

Consequently, the purpose of respondents' occasional verification contacts was a central and essential issue of the prosecution. Otherwise, this case would not have been prosecuted criminally. Four federal courts had previously ruled in the context of civil antitrust cases involving "price exchanges" that competitive price verification to establish the "good faith meeting competition" defense was lawful. *Gray* v. *Shell Oil Co.*, 469 F. 2d 742, 746-47 (9th Cir. 1972), *cert. denied*, 412 U. S. 943 (1973); *Belliston* v. *Texaco Inc.*, 455 F. 2d 175 (10th Cir.), *cert. denied*, 408 U. S. 928 (1972); *Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248 (D. Ala. 1971); *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N. D. Cal. 1971). One of those rulings specifically exonerated the verification contacts relating to gypsum wallboard in litigation to which the United States was a party and from which the petitioner sought no appeal. *Wall Products Co.* v. *National Gypsum Co.*, *supra; see* Petition at 6a-7a, 22a-23a.

Moreover, this Court has repeatedly ruled that even price information exchanges which have a stabilizing effect on prices should be analyzed under the rule of reason and should not be considered *per se* offenses. *Maple Flooring Mfg. Assn.* v. *United States*, 268 U. S. 563 (1924); *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588 (1924); *United States* v. *Container Corp. of America*, 393 U. S. 333, 338-39 (1969); *United States* v. *Citizens & Southern National Bank*, 422 U. S. 86, 113-

2. See the Government's Petition for a Writ of Certiorari (hereinafter cited as "Petition") at pp. 12a, 28a.

117 (1974). Throughout the trial, therefore, the principal factual issue was whether respondents had conspired to agree on prices and, included within that issue, whether their verification contacts had been for the purpose of stabilizing prices or for the purpose of complying with the dictates of the Robinson-Patman Act.

2. *Verification Contacts and the Statutory Period*. Although the indictment spanned the period from 1960 until December 27, 1973, it is significant that the period covered by the applicable five-year statute of limitations extended from December 27, 1968 until December 27, 1973. In its internal memoranda, the prosecution candidly recognized that its case for the statutory period was weak, particularly against individual respondents such as Andrew Watt.[3] In fact, unrebutted evidence established that United States Gypsum (USG), respondent Watt's employer, did not make a single verification contact regarding gypsum wallboard prices during the entire statutory period. (App. 2056a, 2073a-74a, 3238a-41a, 3244a)

Importantly, respondent Watt formally directed in writing that USG employees cease verification on all of the company's products in addition to gypsum wallboard, on February 13, 1969, less than two months into the statutory period. He did so pursuant to conservative legal advice that, in view of the January 1969 decision in *United States* v. *Container Corp. of America, supra*, all verifications should be discontinued until the law of price information exchanges could be clarified. (App. 96ex; 3242a-44a, 3306a-09a) Therefore, the petition's implication that there was a "routine" practice of verification by respondents, particularly USG and Andrew Watt, during the statutory period is unsupported.

3. *Price Competition and Declining Price Trends*. Gypsum board prices actually declined during the 13-year period of the indictment. Average realized prices reached ten-year lows dur-

3. See Defense Exhibits 39 and 41 at the pretrial Evidentiary Hearing.

ing the statutory period. (App. 1991ex, 2097ex, 2149ex, 2150ex, 2219ex) For example, USG's average realized price for ½-inch wallboard fell from a level of $42.55/MSF in 1961, to $40.03/MSF in 1968, to $36.02/MSF in 1969, and finally to a low of $31.29/MSF in 1970. (App. 1991ex, 2097ex) During the later period of price controls, USG's average realized price increased somewhat to $35.79/MSF in 1973 (App. 1991ex), still well below the 1961 and even the 1969 levels.

Without rebuttal from any prosecution witness, Dr. Richard Cyert, a distinguished economist and president of Carnegie-Mellon University, testified on the basis of several detailed studies that respondents had engaged in "rampant price competition" during the entire statutory period, which was completely inconsistent with the claimed conspiracy. (App. 3085a-86a) Dr. Cyert studied actual and list prices in eight major markets throughout the country and found both wide-ranging differences in prices between respondents and widespread and occasionally complete discounting from list prices in various markets for months at a time. (App. 3084a-86a, 3093a-94a, 3097a-99a, 3105a-07a) The prosecution called an economic expert witness who failed to give any opinion as to the existence or nonexistence of the alleged conspiracy and who did not dispute Dr. Cyert's data or his conclusion that the gypsum industry was highly competitive throughout the statutory period.

The petition is also incorrect in suggesting that the vigorous price competition in the statutory period was attributable to smaller, non-defendant companies. Substantial evidence, essentially not contradicted in the record, identifies the causes of the declining price trends to be over capacity in the industry and the adoption of changing competitive tactics primarily by Georgia Pacific, USG, and other respondents. (App. 2155a-57a, 2278a-79a, 2280a-82a, 2297a-98a) In fact, the prosecution inconsistently argued that respondents' prices had fallen so low by 1970 that they were predatory against the smaller, non-defendant companies which were actually charging higher prices and continuing to verify reported price discounts with each other.

4. *Jury Instructions and Coercion.* Following a lengthy trial, punctuated by repeated errors of the trial court and prosecutorial misconduct, the trial court refused to rule on respondents' timely filed supplemental requests for charge. (Petition at 35a-36a) Instead, in a case of incredible complexity and length, the court extemporized its charge and, in so doing, committed several substantive errors. (Petition at 29a-39a) When the jury sought clarification of the instructions, the court was unable to repeat the charge until a transcript was readied. (Tr. 14,984)

The jury repeatedly reported itself deadlocked, ill and exhausted over the next seven days. On three separate occasions, the jury was given a "dynamite" charge to no avail. (Petition at 40a-42a) On the seventh day, the trial court met privately with the foreman who explained that the deadlock was hopeless (App. 4068a):

> "We have taken enough ballots now, and we have had enough discussions. and the way it is divided is not going to be settled by any document, any rememberance of any testimony. It is based on a belief and even if they—even if they would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no . . ." (App. 4066a-67a.)

In parting with the foreman, the trial court improperly reinforced the foreman's belief that the jury would have to keep deliberating until it reached a verdict:

> "MR. RUSSELL: You are after a verdict one way or the other.
>
> "THE COURT: Which way it goes doesn't make any difference to me." (App. 4069a-70a.)

As the Court of Appeals commented, the trial court's subsequent explanation to counsel of what occurred in the private conference with the foreman was not "accurate or even substantially accurate." (Petition at 44a-45a)

5. *Court of Appeals Decision.* The Court of Appeals bottomed its reversal on a "thorough scrutiny of the voluminous

record and careful consideration of the *many* issues raised on appeal." (Petition at 12a, emphasis supplied)[4] The petition incorrectly suggests that review of the several criminal law "jury instruction" issues is needed to resolve a dilemma on remand. Petitioner argues that because Judge Adams did not believe that the instructions on those issues by themselves required reversal, the same instructions would have to be given again at the retrial. (Petition at 17, n.19) That dilemma is illusory since Judge Adams specifically admonished the trial court to incorporate the views of Judge Hunter in rephrasing its charge at a second trial. (Petition at 50a) Similarly, it should be noted that Judge Hunter did not disassociate himself from Judge Adams' conclusion that the verdict was coerced.

REASONS FOR DENYING THE PETITION.

The reasons for denying the petition are many. Essentially, review in this case is most unlikely to change the result given the several separate grounds of decision on which the appellate judgment is based. The petition invites the Court to mire itself in the unique circumstances of this prosecution by reviewing a miscellany of independent and cumulative trial errors and assessing the seriousness of each in light of the entire record. No claim is made that any of those issues, save the "antitrust" issue, is worthy of the Court's attention except as they may impact on this single case.

Review of the antitrust issue is not only likely to be moot, it is uncalled for. As sometimes happens in the progression of cases, the petitioner has lost sight of the fundamental theory and

4. In light of the Court of Appeals' view that erroneous jury instructions and the coercion of the jury necessitated a new trial, its opinion did not reach additional grounds for reversal presented by respondents. Reversal was also required by grave and repetitive prosecutorial misconduct, the trial judge's improper partiality for the prosecution, and several prejudicial evidentiary rulings.

charge on which this criminal prosecution was brought. Moreover, petitioner actually seeks a change of law which could not be retroactively applied in the context of a criminal prosecution. The judgment of the Court of Appeals on the antitrust issue is both sound and consistent with past Supreme Court decisions. Petitioner acknowledges that there is no conflict in the circuits. Thus, even on the issue of concern to petitioner, *certiorari* should be denied since the ruling would not be applicable to this case and would require a prospective change of law which a review of precedents establishes is wholly unwarranted.

I.

THE PRESENCE OF MULTIPLE GROUNDS SUPPORTING THE DECISION BELOW WARRANTS DENIAL OF THE PETITION.

Petitioner claims incorrecly that it prevailed on all issues in the case other than the antitrust issue. (Petition at 16) In fact, by deciding the issues it did, the Court of Appeals avoided having to reach several issues presented to it which also would have required reversal. Those issues, in addition to the four grounds for reversal addressed by Judges Hunter and Adams, would all have to be reviewed and decided adversely to respondents before the judgment below could be changed. Brief examination of the many errors committed by the trial court demonstrates that eventuality to be most improbable.

A. *Inadequate Conspiracy Law Instructions.* The prosecution was allowed to introduce at trial evidence of many different and unrelated episodes and sporatic events involving fewer than all respondents and growing out of localized market conditions. The prosecution was also allowed to argue that those occurrences were all connnected to a common, single price fixing conspiracy, as charged. The danger of catching innocent persons in such a sprawling, drag-net prosecution has been frequently noted. *Krulewitch* v. *United States*, 336 U. S. 440,

445 (1949); see Petition at 34a. The potential for miscarriages of justice is particularly acute when, as here, most of the episodes and events occurred and were concluded well before the statutory period. *United States* v. *Borelli*, 336 F. 2d 376, 384-86 (2nd Cir. 1964).

The trial court at no time gave instructions covering either of the two following well-established conspiracy law principles, even though proper instructions on those principles were submitted by respondents: (a) the trial court never told the jury that participation in one of the allegedly conspiratorial subsidiary events was insufficient, wihout more, to support a verdict of guilty (App. 32a); and, (b) the trial court never told the jury that proof of a series of separate conspiracies would not suffice for proof of the single, unitary conspiracy, charged in the indictment. Failure to give both requested instructions in the context of this case was prejudicial error.

Petitioner's argument that the failure to give these instructions was not prejudicial is a bootstrap. It urges that the precedents requiring such instructions are inapplicable because, in the petitioner's view, the conspiracy "depended upon the participation of all respondents." (Petition at 17, n.20). Such an argument reflects explicitly the "all or none" choice which the trial court's instructions left the jury and which Judge Hunter correctly condemned under *United States* v. *Borelli*, *supra*. The folly and injustice of petitioner's argument is readily apparent from its implicit assumption that if two or more companies had conspired to fix prices, the individual respondents such as Andrew Watt were necessarily and inevitably participants in it.

B. *Improper Withdrawal and Abandonment Instruction.* Contrary to petitioner's claim, the trial court did not permit the jury to consider any affirmative action to disavow or defeat the claimed conspiracy, such as a resumption of vigorous price competition, in order to prove withdrawal or abandonment

prior to the statutory period. Defendants requested an instruction on the withdrawal issue that recognized that affirmative action was required, but which left for the jury to determine whether the direct and substantial evidence of price competition during the statutory period was sufficient to prove that the requisite affirmative action had been taken. (App. 4094a) The trial court rejected the defense request and improperly limited the jury's consideration to just two technical, precise methods of communicating withdrawal:

> "To withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosure of the illegal scheme to law enforcement officials." (Petition at 38a).

The cases firmly establish that "withdrawal" is not a narrow concept established only upon proof of precise affirmative acts and that it may be proven by evidence of conduct inconsistent with the theory of continuing adherence. See, *e.g.*, *Buhler* v. *United States*, 33 F. 2d 382, 384 (9th Cir. 1929); *Wall Products Co.* v. *National Gypsum Co., supra*, 326 F. Supp. at 328.

C. *Jury Coercion.* The circumstances establishing coercion of the jury verdict are fully stated in Judge Adams' concurring opinion. (Petition at 40a-49a) The petition lifts out of context partial quotations from various transcripts and instructions without disclosing to the court that on three occasions the trial court had given a "dynamite" charge to the jury before the trial court met privately with the jury foreman. At that conference, the foreman expressed his belief, once again, that the jury was hopelessly deadlocked, that no verdict could be reached on the basis of the evidence, and that, nonetheless, the trial court was after a verdict "one way or the other." (Petition at 43a-44a) Read in context, the transcript of the conference leaves no doubt that the trial court reinforced the foreman's belief that a

deadlock was an unacceptable result to the court. The impropriety of the discussion with the jury foreman was heightened by the trial court's failure to give defense counsel an accounting of the conference which was, in Judge Adams' words, "accurate or even substantially accurate." (Petition at 44a-45a)

D. *Other Instructional Errors.* With respect to the antitrust issue, the trial court violated the respondents' right to a jury trial by creating an irrebuttable presumption of guilt which was wholly inappropriate in a criminal case. The trial judge told the jury that if the natural effect of verification had been to stabilize prices, "then the parties to the [verification] are presumed as a matter of law, to have intended that result." (App. 3885a) This instruction directed a verdict against the respondents on the issue of whether their purpose was to stabilize prices, regardless of what the actual purposes may have been. The prejudice flowing from this instruction was enormous since the trial judge had also instructed that the respondents should be convicted of the crime charged if their purpose was to stabilize prices. (Petition at 7) Moreover, the trial judge refused to instruct the jury that they could consider the relevance of legal advice that verification was a lawful method of compliance with the Robinson-Patman Act, and failed to adequately charge the jury that respondents could engage in verification to protect themselves against consumer fraud. *Cement Mfrs. Protective Assn.* v. *United States, supra*, 268 U. S. 588; *Wall Products Co.* v. *National Gypsum Co., supra*, 326 F. Supp. at 315.

In addition, even were the petitioner's interpretation of the *Container* case correct, it would have been improper to apply that interpretation retroactively to the period prior to the decision in *Container*. Since respondent Watt had directed verification on gypsum products to end prior to *Container* and further directed that verification by USG on all products cease immediately after *Container* was decided, he was entitled to an instruc-

tion precluding retroactive application of that interpretation. Respondent Watt submitted such an instruction which was erroneously rejected by the trial court. (App. 4187a)

E. *Other Trial Errors.* The trial of this case was marred by several errors in addition to the incorrect jury instructions, and the improper coercion of the jury. The trial judge committed numerous errors in evidentiary rulings, and in comments before the jury displayed a partiality to the prosecution. That partiality was further reflected in permitting the prosecutor to engage in flagrant and repetitive misconduct. The more than 100 examples of misconduct cited to the Court of Appeals included the fabrication of a documentary exhibit, and the knowingly false assertion to the jury that defense counsel for respondent Watt had elicited perjured testimony from his client.

The Court of Appeals was not required to reach all of these other issues once it had concluded that for the reasons stated, reversal was required. However, the jury verdict could not be reinstated by granting the petition unless all of these multitudinous and grossly prejudicial errors were thoroughly reviewed and passed upon by this Corut. Since those issues are largely unique to the peculiar facts and record of this case, no particular precedential value would attach to such an exercise.

II.

THE COURT OF APPEALS' RULING ON THE "VERIFICATION" ISSUE DOES NOT CONFLICT WITH THE LAW IN OTHER CIRCUITS AND IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

A. The Court of Appeals' Ruling on the "Verification" Issue Does Not Conflict with the Law in Other Circuits.

The trial court improperly instructed the jury that respondents' purpose for verification was irrelevant if that verification had any stabilizing effect upon prices (Petition at 13a) and, further, that the jury was to *presume, as a matter of law,* that respondents' purpose was unlawful (regardless of the actual

evidence) if the effect of verification was to stabilize prices. (App. 3884a-85a) The Court of Appeals held that these instructions constituted reversible error, and that the district court should have instructed the jury that verifying reported lower competitive prices was lawful if respondents' purpose was to establish a "meeting competition" defense. Courts of Appeals have twice previously decided this question consistent with the decision below. *Gray* v. *Shell Oil Co.*, 469 F. 2d 742, 746-747 (9th Cir. 1972), *cert. denied*, 412 U. S. 943 (1973); *Belliston* v. *Texaco Inc.*, 455 F. 2d 175 (10th Cir. 1972), *cert. denied*, 408 U. S. 928 (1972). Indeed, *Gray* expressly approved the verification instruction submitted in the trial court by respondent Watt. (App. 4186a) In each case *certiorari* was denied, although, as both the Third Circuit and the petition recognize, the two earlier appellate decisions were significantly broader than the opinion below. (Petition at 9-10, n. 7; and 24a)

Similarly, two federal district courts have ruled that verification for the purpose of Robinson-Patman Act compliance does not violate the Sherman Act. *Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248 (S. D. Ala. 1971); *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N. D. Cal. 1971). The latter case was a "civil action alleging essentially the same conspiracy charged here". (Petition at 22a) Significantly, the Government was a party to the civil *Wall Products* litigation (*United States* v. *United States Gypsum Co.*, Civil No. 71-2467 (N. D. Cal., filed Dec. 30, 1971)), but voluntarily dismissed its action without seeking appellate review of the district court's ruling on "verification" in the gypsum industry.

B. The Court of Appeals' Ruling on the "Verification" Issue Is Consistent with Prior Decisions of This Court.

Petitioner contends this case requires Supreme Court review because the Court of Appeals' "verification" ruling is inconsistent with this Court's decision in *United States* v. *Container Corp. of America*, 393 U. S. 333 (1969). The petition argues

that *Container* holds every price-stabilizing information exchange *per se* illegal regardless of purpose.[5] However, the decisions of this Court from *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U. S. 563 (1924), to *United States* v. *Citizens & Southern National Bank*, 422 U. S. 86 (1974), make clear that the legality of price-stabilizing exchanges depends upon their purpose.

Maple Flooring involved dissemination of prices received without disclosure of the seller's identity. It was conceded that the exchanges stabilized prices because they "would tend to bring about uniformity in prices . . .," 563 U. S. at 567. Nevertheless, the exchanges were held lawful. *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588 (1924), upheld exchanges of price and volume information relating to contracts under which suppliers agreed to deliver all cement required for a specific job at a fixed price regardless of subsequent price increases. It was conceded that the exchanges had a "necessary leveling effect" on prices and that "there is substantial uniformity of price of cement," 268 U. S. at 605. The exchanges were again held lawful because they enabled sellers to avoid duplicate deliveries of low-price cement by several suppliers to the same job.[6] *Container* cited *Cement* approvingly as illustrating a legitimizing "controlling circumstance," *viz.* an exchange for the purpose of preventing customers from fraudulently securing a lower price. 393 U. S. at 335.

United States v. *Citizens & Southern National Bank*, 422 U. S. 86 (1974), reaffirms each of the above decisions. In order

5. Petitioner erroneously states that the jury in this case found that verification had a price-stabilizing effect. (Petition at 15) The fact is, however, that the jury was instructed to convict if it found that any one of thirteen different practices, including verification, was done pursuant to a conspiracy. (App. 3873a-77a) Under those circumstances, it is at least as likely the jury agreed with the defense that the alleged stabilizing effect on prices was disproved by the evidence that 1970 prices were 30% below prices 10 years earlier at the inception of the claimed conspiracy.

6. Contrary to Petitioner's argument (Petition at 13), *Cement Manufacturers* cannot be distinguished as involving "completed transactions." See 268 U. S. at 594-595.

to expand through internal growth while avoiding Georgia's anti-branch banking law, defendant established 5% owned banks which it regularly furnished with price information on rates. It was again established that "prices did not often vary significantly" among the banks and that the lack of price competition was an indirect result of the information exchanges. 422 U. S. at 113-114. But again, a legitimizing controlling circumstance was found in the necessity to avoid Georgia's restraint on branch banking for the laudible purpose of increasing competition through internal expansion. 422 U. S. at 116-117. Clearly, the necessity to obey a federal price discrimination law imposing punitive treble damages is at least as compelling a "controlling circumstance" as the desire to avoid state branch banking restrictions.

C. The Petitioner's Proposed Revision of the Court of Appeals' Ruling on Verification Cannot Be Applied Retroactively to Respondents' Conduct.

The principal thrust of the petition's argument against the Court of Appeals' ruling on verification is that it "undermines" the Sherman Act in its effort to reconcile the Robinson-Patman Act with the Sherman Act. However, even if this argument were true, which it is not, there is still no basis for granting *certiorari* in this case. The reconciliation of the two statutes now advanced by the petition would constitute a change in law which cannot be applied retroactively to respondents' conduct.

Petitioner, joined at this late date by the Federal Trade Commission, argues that the necessity of verifying a customer's claim of a lower competitive price can be avoided by construing § 2(b) of the Robinson-Patman Act as allowing a seller to meet a claimed lower price so long as it does not appear from known facts that the buyer is *lying*. (Petition at 14-15) Prior to this litigation, however, no reported decision of any court nor any opinion of the Justice Department or the Federal Trade Commission had ever taken this position. As demonstrated by

this Court's decision in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 759-60 (1945), the law at present is that the seller must ascertain facts sufficient to reasonably verify that the buyer is *truthful*:

> "[T]he statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

Accord, Viviano Macaroni Co. v. *Federal Trade Commission*, 411 F. 2d 255, 259 (3rd Cir. 1969). Thus, the petition's newly advanced interpretation of the Robinson-Patman Act is a significant departure from prior law.

This administrative construction of § 2(b) now suggested by the Justice Department and the Federal Trade Commission may indeed alleviate in the future any alleged conflict between § 2(b) and the Sherman Act. However, it cannot be applied retroactively to respondents' verification at any future trial. (Petition at 10) See, *e.g., Stanley Marks, et al.* v. *United States*, ... U. S. ....., 45 U. S. L. W. 4233 (March 1, 1977); *Bouie* v. *City of Columbia*, 378 U. S. 347, 352-54 (1964). Therefore the petition's arguments concerning verification, even if valid, do not warrant *certiorari* in this particular case.

CONCLUSION.

In an effort to secure the reinstatement of convictions produced by trial errors, the petition attempts to transform this criminal prosecution into a straight "price-exchange" case. But this was *not* what was charged in the indictment; nor was this case argued and submitted to the jury as a "price-exchange" case. As previously noted, the indictment charged, and the prosecution maintained throughout the trial, that price verification was but one of thirteen claimed methods *purposely* used by respondents to further an alleged sprawling, 13-year conspiracy to fix prices, credit terms, and packaging methods for gypsum wallboard. In view of this charge, accurate jury instructions on the relevance of respondents' purpose in verifying were essential, but were not given. A writ of certiorari should not be used as a vehicle for permitting the prosecution to justify this instructional error by changing its entire theory of the case on appeal.

Moreover, the complexity of the many factual issues involved, and the multiplicity of the grounds requiring reversal of the convictions, also make this case inappropriate for Supreme Court review. Irrespective of this Court's view of the verification issue, this case must be retried in any event. Accordingly, the petition for certiorari should be denied.

Respectfully sumitted,

FRED H. BARTLIT, JR.,
THOMAS A. GOTTSCHALK,
JEFFREY S. DAVIDSON,
KIRKLAND & ELLIS,
Suite 6000,
200 East Randolph Drive,
Chicago, Illinois 60601,
(312) 861-2000,
Attorneys for Appellant,
Andrew J. Watt.

Of Counsel:
KIRKLAND & ELLIS,
200 East Randolph Drive,
Chicago, Illinois 60601,
(312) 861-2000.

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